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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. —**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**REUBEN D. SILLIMAN**

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## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit in the above-entitled case.

### **OPINIONS BELOW**

The opinion of the Circuit Court of Appeals (R. 1-19)<sup>1</sup> is reported at 167 F. 2d 607. The opinion of the District Court for the District of

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<sup>1</sup> References to the proceedings on appeal are designated as "R."; to the Appendix printed by the defendant below as "D."; to the Appendix printed by the Government below as "G."; and to the Appendix filed with the Government's petition for rehearing as "G. R." Government exhibits are cited as "G. Ex." and the defendant's as "D. Ex."

New Jersey denying the respondent's motion for dismissal of the complaint and for summary judgment, and granting the petitioner's motion to have certain defenses stricken (D. 117a-136a), is reported at 65 F. Supp. 665.

#### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 25, 1948 (R. 20). A petition for rehearing was denied on April 27, 1948 (R. 37). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

The United States, as a judgment creditor of a decedent's estate, participated in a state probate proceeding for the purpose of objecting to allowances of counsel fees to a lawyer on the ground that his services to the estate had been fraudulent. The transcript of proceedings in the probate court shows that the counsel fees in respect of the particular services alleged to be fraudulent were disclaimed and for that reason disallowed. Moreover, the transcript also shows that in allowing fees for the remaining services, there was neither any issue of fraud nor any evidence presented as to fraud. The questions here are:

1. Whether, in a subsequent civil action for fraud against the lawyer in a federal court, the United States is foreclosed from showing fraud

on the ground that the partial allowance of fees by the state court is *res judicata* as to the absence of fraud.

2. Whether the United States risks being foreclosed under the doctrine of collateral estoppel by raising (without litigating) an issue in a state probate proceeding in an incidental connection which it thereafter undertakes to litigate directly in a federal district court.

3. Whether an issue which is raised but not litigated, and which is not determined either expressly or by necessary implication, becomes *res judicata* in a second and wholly distinct proceeding.

#### STATUTES INVOLVED

The issues raised by the present proceeding are not statutory. The action was brought pursuant to Jud. Code § 24 (1) (28 U. S. C. 41 (1)).

#### STATEMENT

The United States brought the present action to recover from an attorney sums of which it had been defrauded by reason of a conspiracy between this attorney and his client, now deceased. The jury found for the Government, but the judgment entered on the jury's verdict was reversed by the court below, on the ground that the issue of fraud had become *res judicata* because of certain proceedings in a Surrogate's Court in New York, which concerned the allowance of counsel fees to the attorney for services to his deceased client's

estate, fees which were opposed by the United States as judgment creditor of the estate. The facts out of which the present litigation arose may be summarized as follows:

1. *Background.*—The client in the case, Johann F. Hackfeld, was born in Germany in 1856 (G. 33a). He came to the then independent Kingdom of Hawaii, and, after that country became a Republic, received from it a Certificate of Special Rights of Citizenship, which extended “all the privileges of Citizenship,” limited to the period of his domicile in the Republic, but “without thereby prejudicing his native Citizenship or allegiance” (G. 96a-97a). Hackfeld was never naturalized in the courts of the Kingdom, Republic, or Territory of Hawaii.<sup>2</sup> Around 1900, he took his family back to Germany (D. 218a-219a; G. 73a-74a), sold his Honolulu home (*ibid.*), and bought two houses in Germany (G. 89a). During the years 1900 to 1914, he travelled between Germany and Hawaii on business (D. 359a-363a). When World War I broke out, he was in Ger-

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<sup>2</sup> The Certificate just mentioned was issued by the Minister of the Interior pursuant to Art. 17, Sec. 2, of the Constitution of the Republic of Hawaii (G. 97a). Naturalization, however, was placed under the exclusive jurisdiction of the Justices of the Supreme Court, and required, *inter alia*, an oath abjuring allegiance to the alien's native land. Haw. Const. 1894, Arts. 18, 101; G. 98a-99a. Hackfeld never took any of the steps which the Hawaiian Constitution made requisite to naturalization, nor was he ever naturalized in any American court after annexation.

many, and he remained there through 1923 (G. Ex. 1, D. 458a). His wife and children never returned to Hawaii (D. 220a).

Hackfeld had prospered in Hawaii, and, in 1918, owned a controlling interest in H. Hackfeld & Co., Ltd., one of the five largest sugar factoring companies in the Islands (D. 459a). After the passage of the Trading with the Enemy Act in October 1917, Hackfeld's Hawaiian property was seized by the Alien Property Custodian (G. Ex. 1, D. 458a). It was subject to seizure because Hackfeld, as a resident of Germany, was an enemy within the Act regardless of nationality.<sup>3</sup> The Custodian reorganized H. Hackfeld & Co., Ltd., sold it as a going concern to a new corporation, and held the proceeds in the names of the former enemy owners (G. Ex. 53, G. 78a-81a).

Enemies of American nationality were enabled to recover their seized property as early as 1920,<sup>4</sup> but no provision was made for returns to enemies of German nationality until 1923; the Winslow Act passed in that year permitted them to receive \$10,000 of seized capital, and \$10,000 income a year.<sup>5</sup> Hackfeld made no move for the return of his property until 1923, when he retained a lawyer to file a claim under the Winslow Act (D. 171a). Later that summer, he retained an-

<sup>3</sup> Sec. 2 (a) of the Trading with the Enemy Act, 40 Stat. 411 (50 U. S. C. App. 2 (a)).

<sup>4</sup> Act of June 5, 1920, c. 241, 41 Stat. 977.

<sup>5</sup> Act of March 4, 1923, c. 285, 42 Stat. 1511.

other lawyer, the respondent Silliman (G. Ex. 4, G. 31a), and in the fall of 1923 Silliman, on Hackfeld's behalf, filed a claim for the return of all the seized property, representing under oath that Hackfeld was an American citizen domiciled in Hawaii (G. Ex. 3, D. 458a). The Custodian required proof of citizenship and advised Silliman to have Hackfeld obtain a passport (D. 27a). Hackfeld applied for one, alleging that he had become a Hawaiian citizen in 1894 and an American citizen in 1900, that he had always believed himself to be an American citizen, that Honolulu was his home, and that he had never expatriated himself (G. Ex. 6, D. 468a). In due course, on the strength of representations made by Silliman,\* and reassured by the report of Vice-Consul Roll, who had taken Hackfeld's affidavit in Bremen and who happened to be visiting

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\* In order to neutralize the statutory presumption of expatriation created by Hackfeld's long residence in his native land, it was essential to satisfy the authorities that Hackfeld had not intended to expatriate himself or that he had been consistently loyal to the United States. Section 2 of the Act of Mar. 2, 1907, c. 2534, 34 Stat. 1228, 8 U. S. C. (1934 ed.) 17; Sec. 21 of the Trading with the Enemy Act, 42 Stat. 1516, 50 U. S. C. App. 21. Accordingly, Silliman represented to officials of the State Department and the Department of Justice, *inter alia*, that Hackfeld had never held himself out as a German (G. Ex. 8, 9; G. 33a, 46a), that he had strongly supported the early entry of America into the war on the side of the Allies (G. Ex. 3; D. 458a), and that after the American declaration of war he had purchased Liberty Bonds (G. Ex. 8, 9; G. 33a, 46a).

the United States, the State Department issued Hackfeld a passport (D. 294a-304a).

Armed with this passport, Hackfeld came to the United States and obtained the return of his seized property; the allowance was recommended by Attorney General Stone, and, in April 1924, signed by the President (G. Ex. 47, D. 494a). All told, Hackfeld received, between 1924 and 1931, some \$3,867,229.86, the greater part thereof in 1924 (D. 119a). Once his status as an American had been recognized, Hackfeld and certain other former stockholders in H. Hackfeld & Co., Ltd., sued the purchasers and reorganizers of that concern, alleging that the Hackfeld firm had been fraudulently sold for less than its true value (G. R. 39a). This litigation terminated unsuccessfully in April 1932, after many years in the courts,<sup>7</sup> and in August 1932 Hackfeld died in Germany (G. 78a). He had never lived in the United States after 1924, except for brief visits, and had never set foot in Hawaii after 1914 (G. 88a-89a).

2. *Litigation by and against the Hackfeld estate.*—Hackfeld having failed during his lifetime to establish that H. Hackfeld & Co., Ltd., was worth more than its sale price in 1918, his ancillary executor in the United States, one Fredrick Rodiek, undertook thereafter to prove the

<sup>7</sup> *Isenberg v. Sherman*, 212 Cal. 454, rehearing denied, 212 Cal. 507, motion to recall remittitur denied, 214 Cal. 722, certiorari denied, 286 U. S. 547.

same thesis. But instead of proceeding against the purchasers, Rodiek undertook to recover the difference between proceeds and alleged true value from the United States. Accordingly, after a private relief bill for his benefit (S. 3227, 73d Cong., 2d sess.; G. 87a) had been referred by the Senate to the Court of Claims (S. Res. 229; G. 87a), Rodiek (represented by Silliman) brought a Congressional Reference in the Court of Claims under Jud. Code § 151 (28 U. S. C. 257). In this proceeding, he alleged Hackfeld's American citizenship and domicile in Hawaii, and sought to recover some \$3,000,000 (G. 79a).

After this litigation started, in July 1934, the Government investigated and, after investigation, brought an action against Rodiek as ancillary executor in the District Court for the Southern District of New York, to recover a portion of the payments theretofore made to his decedent (D. 23a, 33a, 119a), alleging that they had been made by reason of fraud, mistake of law, and corruption. The complaint alleged that, as a matter of law, Hackfeld never had been a Hawaiian citizen at any time and consequently never had been an American citizen; that he had fraudulently misrepresented his belief in citizenship and the material facts bearing on his domicile (which latter bore on the question of expatriation); and that he had made a payment of \$1,500 to Vice-Consul Roll, the same who had made the favorable report to the State Department which resulted in the

issuance of an American passport to Hackfeld.

The Court of Claims proceeding was stayed to await outcome of the New York action; the latter resulted in a directed verdict for the government, on the ground that, as a matter of law, Hackfeld had never acquired Hawaiian or American citizenship at any time. Judgment was entered in the amount of \$1,605,057.32, representing the difference between the amount Hackfeld had received as an American and the largest amount he could have received at any time as a German, together with interest from the respective dates of payment.\* In view of this disposition of the case, the issues of fraud and corruption were not determined at the trial.

On appeal, the Second Circuit affirmed, still on the legal issue of citizenship and without consideration of the other questions. *United States v. Rodiek*, 117 F. 2d 588. A petition for rehearing, asking *inter alia* disallowance of the portions of the judgment representing interest, was denied on the ground that the district judge "did not regard the payments as resulting from an entirely innocent mistake on the part of Hackfeld." *United States v. Rodiek*, 120 F. 2d 760, 762. On certiorari, the judgment in favor of the United

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\*After 1928, Germans were entitled to receive 80% of their seized capital. Settlement of War Claims Act of March 10, 1928, c. 167, 45 Stat. 254. After 1934, however, all further payments were cut off, because of German defaults. Jt. Res. of June 27, 1934, c. 851, 48 Stat. 1267.

States was affirmed by an equally divided court. 315 U. S. 783 (No. 325, Oct. T. 1941).

Thereafter the Court of Claims resumed consideration of the Congressional Reference. It found facts amounting to fraud, found as a fact that Hackfeld had paid \$1,500 to Vice-Consul Roll, and concluded that the Hackfeld estate had no legal or equitable claim against the United States. *Rodiek v. United States*, 100 C. Cls. 267.

3. *The Present Proceeding.*—The Hackfeld estate in the United States was insufficient to satisfy the judgment obtained by the Government in the New York proceeding. It was clear from the lengthy record in that case that Hackfeld had never represented himself as being an American citizen prior to retaining the respondent Silliman as counsel. Accordingly, the United States brought the present tort action, alleging that the respondent had induced the allowance of Hackfeld's claim by false and fraudulent representations as to the latter's citizenship, domicile, and loyalty (D. 14a-16a), specifically that, knowing Hackfeld to be a German and an ineligible claimant, the respondent had filed a claim representing Hackfeld to be a loyal American, domiciled in Hawaii, and eligible for a return of all his seized property; that the respondent Silliman had conspired with Hackfeld to defraud the United States; and that he, the respondent Silliman, had likewise made a payment to Vice Consul Roll, this one in the amount of only \$500 (D. 18a). The

*ad damnum* sought was the amount of the unsatisfied balance of the judgment against Hackfeld's estate, with interest (D. 24a).

A motion to dismiss the complaint and for summary judgment was denied by the District Court in a careful opinion (*United States v. Silliman*, 65 F. Supp. 665 (D. N. J.); D. 117a-145a), and, after a jury trial, judgment was rendered for the Government on a verdict in its favor, in the amount of \$1,106,031.45, the sum prayed for with interest to the day before the verdict (D. 10a, 455a). On appeal, the court below reversed (R. 1-20). It proceeded on the ground that the issue of fraud between the United States and the respondent Silliman had been litigated and determined before the Surrogate of New York County, in a proceeding for the allowance of Silliman's counsel fees from the Hackfeld estate where the United States filed objections as judgment creditor. It held, therefore, that the issue of fraud had become *res judicata*. A petition for rehearing (R. 21-36) which pointed out that this issue had been neither litigated nor determined before the Surrogate was denied (R. 27). The ground taken by the court below makes necessary a detailed statement regarding—

4. *The Proceedings in the Surrogate's Court.*—After the entry of the judgment in favor of the Government in the Southern District of New York, the respondent Silliman filed a claim in the Surrogate's Court, New York County, which

was administering Hackfeld's ancillary estate, for counsel fees in respect of services rendered the estate from the time of Hackfeld's death in 1932 until 1943. The United States objected to the allowance of further fees to Silliman, and sought a surcharge as to fees previously allowed on the ground that he had committed fraud (D. 39a-42a). The allegations of fraud related, first, to the filing of Hackfeld's original alien property claim in 1923-1924; those services, occurring during Hackfeld's lifetime, were of course not services to the estate and were relevant only as reflecting the origin and nature of the fraud which, it was alleged, tainted respondent's services in the Court of Claims proceeding. The allegations as to fraud relating to the latter services were made on the footing that respondent had already received fees from the estate for such services, and was seeking further fees for services in the same proceeding (G. R. 38a).

At the hearing before the Surrogate, on December 8, 1943, the respondent testified that up to that time he had received no fees in respect of the Court of Claims proceeding, and that he was not seeking further compensation for any services rendered in that connection (G. R. 5a-6a, 14a). Thereupon the Surrogate eliminated from consideration any services rendered by respondent in the Court of Claims matter, and allowed no fees for such services (G. R. 18a). These were the only services rendered to the estate which the Gov-

ernment alleged to be fraudulent, and, as the stenographic minutes set forth below show, the Government ceased to press its objections based on fraud once the Surrogate eliminated the Court of Claims services from consideration.

Early in the hearing the Surrogate showed his interest in the question whether fees in connection with the Court of Claims matter had been paid or were sought.

The SURROGATE. Will you make a general statement of the nature of that action?

The WITNESS [Mr. Silliman]. Of the Court of Claims proceeding?

The SURROGATE. Yes. In the first item we have therein an attack upon your whole handling of the litigation and the payment of any moneys in connection with it. In the first place, were you paid anything for services in connection with that action?

The WITNESS. No, sir. [G. R. 5a-6a.]

In one form or another, this inquiry was repeated again and again (G. R. 6a-7a, 10a-11a, 12a, 14a, 18a, 19a). At one point the Surrogate admonished Government counsel that the Court of Claims fees were definitely not in issue (G. R. 12a).

The SURROGATE. I cannot follow your suggestion at all here. *This man has taken out of every consideration from me any allowance for services rendered in the Court of Claims.* I am certainly not going to allow him a penny for that on that statement.

If you point out any item in his affidavit of services for which he charges a fee, I will be very glad to disallow it or disregard it. I never heard of an argument where an attorney says, "I do not want any money," to say I must force it on him or do what? [*Italics added.*]

Government counsel reverted to the point, however, and finally the Surrogate expressed himself rather forcefully on what he conceived to be at issue (G. R. 12a-13a).

Mr. JONES [Counsel for the United States]. Our contention is that this \$10,000 payment made to Mr. Silliman was for services in prosecuting the Court of Claims case here, and he admits it.

The WITNESS [Mr. Silliman]. I do not admit it at all.

The SURROGATE. He denies it. Apparently he is going to deny it, from what his son says.

The WITNESS. I simply said there were payments made he knew all about.

The SURROGATE. Taking the other side of your case, Mr. Jones, this man *having withdrawn any claim or renounced any claim for the Court of Claims litigation, then it becomes a question as to what he was reasonably entitled to for other matters in the estate. Why should we litter up this record with all these statements?* Do you think the Surrogate is not keen enough to differentiate between services rendered on

a contingent agreement and the reasonable value of services rendered? [Italics added.]

Mr. JONES. Not at all. Those services were rendered in the Court of Claims case, a fraudulent proceeding, in which he should not be paid.

The SURROGATE. He wants no part of these fees for these services.

Mr. JONES. I am not directing it to the present fees, but the fees already paid.

The SURROGATE. They were fixed by Surrogate Delehanty, a payment on account only, and he is asking for an over-all fee here and the awarding of the balance of \$15,000.

The WITNESS. Yes, \$15,000, what I ask on account of services, and \$1,600 on account of disbursements that have never been paid.

Mr. JONES. I do not know whether it is necessary in this court to offer in evidence the pages as part of the court record or not, but if you will examine those various pages——

The SURROGATE. I am not examining them. *I am here to try a case, not to read a lot of immaterial matters.* I am going to hold you down to your proof strictly within the rules of our court. *I do not care to go into the New Jersey litigation\* unless there is an attempt here on his part to charge a fee for that litigation. \* \* \** [Italics added.]

\* The present proceeding.

Again when certain disbursements were under consideration the Government counsel objected only because he thought they were in connection with the Court of Claims. The Surrogate reassured him on the question (G. R. 19a):

The SURROGATE. Have you any specific objection to these disbursements?

Mr. JONES. Only our general objection that they are not in connection with—the major one in connection with the Court of Claims, and, therefore, they are not allowable.

The SURROGATE. Do any of these items of disbursements within the \$1892.85—

The WITNESS. No.

The SURROGATE.—relate to the Court of Claims?

The WITNESS. No; all for the District Court, the Circuit Court and the United States Supreme Court.

The SURROGATE. Does that assure you, Mr. Jones?

Mr. JONES. I beg your pardon.

The SURROGATE. He says the \$1,892.85 were not in any way connected with the Court of Claims litigation.

Mr. JONES. We have no assurance that they were not.

At the end of the hearing the Surrogate reserved decision upon but one question, the reasonable value of Silliman's services. He had not passed on the truth of the allegations of fraud be-

fore that time, and he failed to reserve the point (G. R. 35a).

In an opinion filed the day after the hearing, the Surrogate overruled all objections, excluded from consideration Silliman's services in the Court of Claims matter, and fixed the reasonable value of the services of Silliman to the estate (D. 43a). The opinion made no mention of fraud. Thereafter a proposed decree was submitted by the respondent as counsel for Hackfeld's executor, a counter decree was submitted by the United States, and memoranda in support of both decrees were filed. The decree submitted by the executor was open to the interpretation that the factual issue of fraud had been litigated before the Surrogate, and the United States objected to the decree on that ground. Although the Surrogate did not grant the United States all the clarification sought, he deleted the following from the decree proposed by the respondent:

and the objectant, the United States of America, having failed to establish the allegations and charges by it in said remaining objections.

Moreover, he added the following paragraph (D. 75a):

Ordered, Adjudged and Decreed that the Surrogate has excluded from consideration any compensation for services which were rendered in the United States Court of Claims because of the fact that they

were covered by a separate agreement between the attorney and the ancillary executor for compensation on a contingent basis \* \* \*

The decree as finally entered does not therefore disclose on its face whether or not the Surrogate considered the truth of the allegations of fraud; it shows only that he overruled the objections based upon them (D. 77a).

When respondent's defense in the present proceeding, that the decree of the Surrogate was equivalent to a finding (having the effect of *res judicata*) that respondent had not been guilty of fraud, was stricken out, the District Court did not expressly decide whether the Surrogate had in fact passed on the existence of fraud; it only held that, even if a determination as to fraud had been made, such determination could not work an estoppel by judgment. *United States v. Silliman, supra*, 65 F. Supp. at 669-670; D. 121a-124a.

The court below, however, on the basis of the pleadings before the Surrogate's Court without more, held that the issue of fraud was decided by that tribunal, and proceeded to hold that this "determination" was binding in the instant action (R. 12-19). A petition for rehearing, to which was attached the transcript of the Surrogate's proceedings (G. R. 1a-35a) to show what was actually decided there, was summarily denied without opinion (R. 37).

## SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Surrogate's Court had passed on the issue of whether the respondent had committed fraud in connection with the presentation and allowance of the Hackfeld claim in 1923-1924.

2. In holding that the proceedings in the Surrogate's Court made the question whether respondent had committed fraud in connection with the presentation and allowance of the Hackfeld claim in 1923-1924 *res judicata* in the present action.

3. In holding that the decree in the Surrogate's Court made the question whether respondent had committed fraud in connection with the presentation and allowance of the Hackfeld claim in 1923-1924 *res judicata* in the present action.

4. In reversing the judgment of the district court.

## REASONS FOR GRANTING THE WRIT

The decision below is in conflict with a long line of applicable decisions of this Court, only recently reaffirmed, as to the proper and narrow scope of the doctrine of collateral estoppel; it is in conflict with a decision in the Second Circuit dealing with a similar question concerning this identical controversy; and it imperils the position of the United States whenever, as in the course of the protracted Hackfeld litigation, it

is required to assert rights and protect assets in State courts.

1. The holding of the Circuit Court of Appeals that the issue of the truth of the allegations of fraud is *res judicata* by reason of the ambiguous decree of the Surrogate is in plain conflict with the hitherto well-settled rule that a judgment in a prior suit involving a different cause of action can operate as an estoppel only as to "the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined." *Cromwell v. County of Sac*, 94 U. S. 351, 353. Or, as stated in *Russell v. Place*, 94 U. S. 606, 608-610:

\* \* \* to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment *necessarily involved* the consideration and determination of the matter.

\* \* \* \* \*

According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record any thing is *left to conjecture as to what was necessarily involved and decided*, there is no estoppel in it when pleaded. [Italics added.]

See also *Hopkins v. Lee*, 6 Wheat. 109, 114; *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661.

This unbroken line of precedent, wholly disregarded by the decision below, was only recently reiterated by this Court in a decision announced after the opinion below but cited to the Circuit Court of Appeals in the petition for rehearing (R. 24, 27, 34-35). *Commissioner v. Sunnen*, 333 U.S. 591.

On the authority of the above cases, the decree of the Surrogate with respect to counsel fees could foreclose litigation of the factual issue of fraud in a tort action only if the Surrogate necessarily and actually determined that issue. Evidently, the Court of Appeals thought that it was meeting this test when it concluded that "the Surrogate decided the issues directly raised 'in the pleadings' by the objections filed by the Government" (R. 14). But all that the Surrogate actually decided was that certain objections to the allowance of fees should not prevail. And it is clear, both from the relevant New York law and from the record in the New York proceedings, that the existence or nonexistence of fraud was not determined by the Surrogate, and was never intended by him to be determined.

A. It was not necessary for the Surrogate to pass on the truth of the Government's allegations of fraud because those allegations became immaterial—and were therefore properly overruled—as soon as the services in the Court of Claims were eliminated from consideration. When those services were put out of the case, the only services for which the Surrogate was asked

to allow fees were services which were not alleged to be fraudulent. The Government's allegations of fraud could have been material to the issue of awarding fees for such nonfraudulent services on one hypothesis only, viz., that a lawyer who has practiced fraud in one phase of his relations with a client is not entitled to the aid of the courts in collecting fees for other and nonfraudulent services. But that hypothesis is not the law of New York. See *Currie v. Cowles*, 6 Bosworth 452 (N. Y. Super. Ct.), rejecting "a rule that would make professional infidelity in one suit work a forfeiture of the right to compensation for meritorious services honorably performed in another."<sup>10</sup> Cf. *Smith v. Hootor*, 51 Misc. 649.

<sup>10</sup> Currie, a client, sued Cowles, his lawyer, to recover damages for fraud. The defendant counterclaimed for the value of other legal services. The referee ruled that Cowles, by fraud in respect to one transaction, had forfeited his right to be compensated for any of his services. The court held otherwise, saying (6 Bosw. at 460):

"On what principle he [Cowles] has forfeited his right to compensation for any of his services except those in relation to [the fraudulent transaction] \* \* \* or except in relation to the matters and proceedings in which he had violated, or in bad faith had failed to perform his professional duty, was not suggested to us \* \* \*."

"The Referee \* \* \* could not justly, upon any recognized rule of equity, disallow a just compensation for services rendered in suits and proceedings disconnected from [the fraudulent acts] \* \* \*."

The same rule prevails in other states. E. g., *Rippey v. Wilson*, 280 Mich. 233, 245-246, 273 N. W. 552, 556 (collecting authorities from other jurisdictions). See 2 Thornton, *Attorneys at Law* (1914) Sec. 556.

Accordingly, unless the record of the proceedings before the Surrogate clearly and unmistakably shows that he did determine the nonexistence of fraud, an inference that he made this determination, based simply upon the overruling of the objections to certain fees, is worse than merely conjectural (cf. *Russell v. Place, supra*); it rests upon an erroneous conception of New York law.

B. The record of the proceedings before the Surrogate, set out above, pp. 11-18, clearly shows that he did not determine the existence or nonexistence of fraud, but, to the contrary, steadfastly refused to pass on the question. On any other basis, it would be difficult to understand why he deleted from the proposed decree the express declaration that the United States had failed to establish its allegations. The changes in the proposed decree, *supra*, pp. 17-18, read in the light of the course of events at the hearing, point to only one conclusion: far from having necessarily and actually passed on the existence of fraud, the Surrogate thought that fraud was relevant only as bearing on services with respect to the Court of Claims action. Consequently, fees for those services having been ruled out, the objections based on fraud were overruled without consideration on the merits.

2. The decision of the court below is in basic conflict with a decision of the Second Circuit involving the same controversy.

When the judgment entered in the federal district court for Southern New York against the Hackfeld estate was being appealed, Rodiek, the ancillary executor, represented by the respondent Silliman, contended that that judgment was erroneous because, *inter alia*, there had been a finding in a prior tax proceeding that Hackfeld was an American citizen. *Rodiek v. Commissioner*, 33 B. T. A. 1020, affirmed *sub nom. Rodiek v. Helvering*, 87 F. 2d 328 (C. C. A. 2). The Second Circuit held, however, that in the tax proceeding Hackfeld's citizenship had not been a material issue, so that even if the Commissioner's admission there, that Hackfeld was an American, was treated as unqualified, it would still not be *res judicata*. Accordingly, the court went on to consider Hackfeld's citizenship as reflected by the record then under review. *United States v. Rodiek*, 117 F. 2d 588, 593.

In the present case, as we have shown, the allegations of fraud in the Surrogate's Court, once the respondent Silliman disclaimed fees for his Court of Claims services, became completely immaterial. They were not asserted as objections to the other fees claimed. Even if we assume *arguendo*, in the face of the overwhelming indications to the contrary in the record, that the Surrogate *did* purport to determine that the allegations of fraud were untrue, any such determination was unnecessary and incidental to the decision of the case before him. Yet the court below

held that the Surrogate's decree allowing those other fees was *res judicata* on the issue of fraud when that issue was raised by the United States directly against Silliman in the present proceeding. In so doing the Third Circuit has done precisely what the Second Circuit properly refused to do; it has given controlling effect to an incidental determination of a matter not necessary to the decision in the first action. Thus there exists a square conflict between circuits arising out of what is in essence the same controversy, namely, the effort of the Government to be made whole for the fraud practiced on it by Hackfeld and Silliman.

3. The decision of the court below makes unduly hazardous the entry of the Government into collateral litigation to assert interests which can be protected in no other way.

Collateral estoppel, like the general doctrine of *res judicata* of which it is an aspect, prevents the parties from establishing the truth. The desirability of putting an end to litigation must be balanced, in both instances, against what the court below describes as the "even firmer established policy of giving every litigant a full and fair day in court" (R. 9). *Res judicata* rests upon "considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." *Commissioner v. Sunnen*, 333 U. S. 591, 597. When a cause of action has received full consideration in a suit based

upon it, that cause is normally *res judicata* for all purposes regardless of the correctness of the decision; the loser has had his day in court. But collateral estoppel is applied "much more narrowly." *Commissioner v. Sunnen, supra*, at 598. The reasons are evident. An issue presented in one case may receive neither the emphasis nor the attention which it deserves in another. The first case may not be of sufficient importance to warrant full litigation of the issue, while the second may be of the greatest importance. The issue itself may be of minor significance in the first case, and yet crucial in the second. The forum in the first case may be of a character different from that appropriate for the second. The record in the prior suit must therefore be narrowly scrutinized to ensure that the issue sought to be foreclosed was actually and necessarily determined; nothing may be left to conjecture. As Judge Learned Hand said in *The Evergreens v. Nunan*, 141 F. 2d 927, 929 (C. C. A. 2):

It is, as we have said, a condition upon the conclusive establishing of any fact that its decision should have been necessary to the result in the first suit. That is a protection, for it means that the issue will be really disputed and that the loser will have put out his best efforts. \* \* \* Indeed, it often works very harshly inexorably to make a fact decided in the first suit conclusively establish even a fact "ultimate"

in the second. The stake in the first suit may have been too small to justify great trouble and expense in its prosecution or defense; and the chance that a fact decided in it, even though necessary to its result, may later become important between the parties may have been extremely remote. It is altogether right that the judgment shall forever put an end to the first cause of action; but it is not plain that it is always fair that every fact \* \* \* decided in it, shall be conclusively established between the parties in all future suits, just because the decision was necessary to the result.

As a judgment creditor of Hackfeld, the United States had no choice but to enter the state court in which his estate was being administered. See *Markham v. Allen*, 326 U. S. 490, 494-495. It was obviously in the Government's interest to preserve that insolvent estate by resisting payment therefrom of counsel fees to one whose services were believed to be fraudulent. But when the services as to which fraud had been charged were excluded from consideration, the allegations of fraud became irrelevant and were so treated by the Surrogate. The issue was thus not "really disputed," and the loser had no occasion to put out its "best efforts." *The Evergreens v. Nunan*, *supra*. Indeed, the Government made no further effort to litigate the excluded questions. But the Circuit Court of Appeals has now construed this action of a state Surrogate on a matter at most incidental

to the case before him (cf. *Restatement, Judgments*, Sec. 71), and in fact treated by him as irrelevant, in a manner which would nullify the verdict of a federal jury, reached after a full trial on the merits.

We do not seek to undermine the important principle that matters once litigated should not be endlessly relitigated. What is here involved is a decision which, in effect, precludes a vital issue from being litigated at all. If the doctrine of collateral estoppel is not to cause a greater evil than the one it is intended to cure, it must be strictly confined within the boundaries laid down by this Court. These boundaries are of the greatest importance to any litigant whose interests must be defended in many jurisdictions and in many proceedings; and they are of particular gravity to the United States. For example, in the administration of alien property, the field in which this litigation arises, the United States succeeds to ownership of interests formerly owned by enemies. In the husbanding of these interests with a minimum of dislocation of local legal procedures, the United States is recurrently required to submit some aspects of its rights to determination by state courts. In other instances, the United States must similarly resort to courts of bankruptcy for the conservation of assets to which it is legally or equitably entitled. Unless the proper limits of collateral estoppel are scrupulously observed, the United States is especially

vulnerable to the risk that, as under the decision of the Circuit Court of Appeals in this case, a collateral proceeding of seemingly limited significance will foreclose a subsequent assertion of rights of far greater importance. If the range of uncertainty is to remain as broad as the decision below makes it, the United States may be compelled to forego the assertion of some of the collateral aspects of its rights, and permit the frittering away of estates of which it is the most significant creditor, in order not to place its more important interests in jeopardy.

By its misapplication of the principles of collateral estoppel, the court below has barred recovery against one found by a jury to have defrauded the United States, although the merits of the charge of fraud had never been decided by any other tribunal, and has thus precluded the United States from coming to grips with the real author of the fraud perpetrated upon it. Such a result, in our view is not in accordance with law, and the mischief which the present holding engenders in a broad field of litigation makes clear the necessity for review by this Court.

#### CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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*Solicitor General.*

JULY 1948.